

LIBRARY
SUPREME COURT, U.S.
IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. ~~75~~ 66

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.**

ANTHONY BRADLEY EBEN,
RICHARD F. WATT,
BERNARD WEISSBOURD,
Counsel for Petitioners.

JOSEPH L. NELLIS,
DUNNING, NELLIS & LUNDIN,
Of Counsel.

	PAGE
Opinions below.....	2
Jurisdiction	2
Questions presented.....	2
Statutes involved.....	3
Statement	5
Reasons for granting the writ.....	9
Conclusion	23

CITATIONS.

Cases:

Bassett v. United States (1890), 137 U. S. 496.....	14
Brunner v. United States (C. A. 6th, 1948), 168 F. (2d) 281	15
Cangelosi v. United States (C. A. 6th, 1927), 19 F. (2d) 923	22
Church v. Hubbard (1804), 2 Cranch. 287.....	20
Clark v. United States (C. A. 5th, 1932), 61 F. (2d) 409	12
Commissioner v. Hyde (C. A. 2d, 1936), 82 F. (2d) 174	20
Commonwealth v. Stevens (1907), 196 Mass. 280.....	23
Cosulich Societa Triestina Di Navigazione v. Elting (C. A. 2d, 1933), 66 F. (2d) 534.....	20
Cuba R. Co. v. Crosby (1912), 222 U. S. 473.....	19
Dowdy v. United States (C. A. 4th, 1931), 46 F. (2d) 417	12
Duncan v. United States (C. A. 7th, 1928), 23 F. (2d) 3	22
Ezzard v. United States (C. A. 8th, 1925), 7 F. (2d) 808	22
Fiswick v. United States (1946), 329 U. S. 211.....	9, 11

Franzen v. E. I. DuPont de Nemours & Co. (C. A. 3d, 1944), 146 F. (2d) 835.	19
Funk v. United States (1933), 290 U. S. 371.	15, 16
Gordon v. Commissioner (C. A. 9th, 1935), 75 F. (2d) 829.	21
E. Geli & Co. v. Cunard S. S. Co. (C. A. 2d, 1931), 48 F. (2d) 115.	21
Griffin v. United States (1949), 336 U. S. 705.	14, 15
Helvering v. Gowran (1937), 302 U. S. 238.	13
Holt v. United States (C. A. 40th, 1937), 94 F. (2d) 90.	12
Krulewitch v. United States (1949), 336 U. S. 440.	10, 11, 13
Lilienthal v. United States (1878), 97 U. S. 237.	22
Lincoln v. Riley (1920), 217 Ill. App. 571.	19
Logan v. United States (1892), 144 U. S. 263.	11
Miles v. United States (1882), 103 U. S. 304.	14
Mora v. United States (C. A. 5th, 1951), 190 F. (2d) 749.	12
Ozanie v. United States (C. A. 2d, 1939), 165 F. (2d) 738.	20
Paul v. United States (C. A. 3d, 1935), 79 F. (2d) 561.	15
J. E. Riley Inv. Co. v. Commissioner (1940), 311 U. S. 55.	13
State v. Henneman (1936), 40 N. M. 166, 56 P. 2d 1130.	22
Tofanelli v. United States (C. A. 9th, 1928), 28 F. (2d) 580.	12
Toshiko Inaba v. Nagle (C. A. 9th, 1929), 36 F. (2d) 481.	19
United States v. Blau (1951), 340 U. S. 332.	10
United States ex rel. Jelie v. District Director (C. A. 2d, 1939), 106 F. (2d) 14.	20
United States v. Hall (C. A. 2d, 1950), 178 F. (2d) 853.	11
United States v. Krulewitch (C. A. 2d, 1948), 167 F. (2d) 943.	11

19	United States v. Rubenstein (C. A. 2d, 1945), 151 F. (2d) 915.....	9, 19
16	United States v. Vigorito (C. A. 2d, 1933), 67 F. (2d) 329	22
21	United States v. Walker (C. A. 2d, 1949), 176 F. (2d) 564	15, 16
21	United States v. Wiggins (1840), 39 U. S. 334.....	20
15	Yoder v. United States (C. A. 10th, 1935), 80 F. (2d) 665.....	15, 16
12	<i>Statutes:</i>	
13	Title 8, U. S. C. § 180a.....	3, 5
22	Title 8, U. S. C. § 220(e).....	3, 5
19	Title 8, U. S. C. § 232.....	4, 5, 6
11	Title 18, U. S. C. § 88.....	4, 5
14	(the revised Criminal Code provision is 18 U. S. C. § 371 (1948)).	
12	<i>Miscellaneous:</i>	
20	Rule 26, Fed. Rules Criminal Procedure.....	14, 17, 24
15	Annotation, 11 A. L. R. 2d 646 (1949).....	16, 17

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951.

—
No. _____
—

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

—
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.**

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Marcel Max Lutwak, Munio Knoll, and Regina Treitler, defendants below, respectfully pray that a Writ of Certiorari issue ~~to~~ review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 3, 1952. The Court of Appeals affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the Petitioners guilty of a charge of conspiracy to violate Sections 180a and 220(e), Title 8, U. S. Code. A petition for rehearing was filed by Petitioners in the Court of Appeals on January 18, 1952; it was denied in a supplemental opinion of that Court on April 16, 1952.

OPINIONS BELOW.

The original opinion of the Court of Appeals for the Seventh Circuit, dated January 3, 1952, and its supplemental opinion, dated April 16, 1952, are both as yet unreported (R. 391-400 and 404-14).

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1) (62 Stat. 928).

QUESTIONS PRESENTED.

1. Are wives competent to testify against their husbands in a federal criminal case involving no personal wrong to the wives?
2. Is it proper for the wives of defendants in a federal criminal case, although presumed to be *prima facie* incompetent as witnesses, to testify as to the very facts necessary to establish their competency, when those facts constitute a major portion of the evidence with respect to the principal issue to be determined by the jury?
3. Are the acts and declarations of a conspirator after the termination of a conspiracy and not in furtherance of it admissible against absent co-conspirators on the question of their intent to conspire?
4. In a federal criminal case, in which the government

is seeking to establish the invalidity of marriages contracted in a foreign country, is not the burden upon the government to prove such invalidity under the applicable foreign law, and does not that burden require the government to prove the foreign law?

5. Where two marriages are shown, is it not the presumption that the second marriage is valid, and is not the burden on the party attacking such second marriage to overcome the presumption that the first marriage was dissolved? Is not an instruction which fails to indicate to the jury that there is a presumption in favor of the second marriage erroneous?

STATUTES INVOLVED.

Title 8, U. S. C., Section 180a:

Any alien who after March 4, 1929, enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than \$1,000, or by both such fine and imprisonment.

Title 8, U. S. C., Section 220(e):

Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both.

Title 18, U. S. C., Section 88 (the revised Criminal Code provision is 18 U. S. C., Section 371 (1948)):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

Title 8, U. S. C., Section 232:

Notwithstanding any of the several clauses of section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States. ***

STATEMENT.

Petitioners were convicted by a jury sitting for the United States District Court for the Northern District of Illinois, Eastern Division, upon an indictment which charged them with conspiring (1) to commit certain offenses set forth in five substantive counts, and (2) to defraud the United States of and concerning its governmental function and right to administer the immigration laws and the Immigration and Naturalization Service of the Department of Justice, in violation of Title 18, U. S. Code, Section 88 (R. 4-9).

The five substantive counts charged Petitioners with securing the illegal entry under the War Brides Act (Title 8, U. S. C., Section 232) at the Port of New York of three aliens (including the Petitioner Munio Knoll), by means of false and misleading representations and the concealment of material facts with respect to the marital status of the aliens, in violation of Title 8, U. S. Code, Section 180a, and with making false statements under oath concerning such marital status in applications required by the immigration laws of the United States, in violation of Title 8, U. S. Code, Section 220(c) (R. 9-14). In effect, the indictment charged that the Petitioners had arranged "ostensible" marriages between discharged veterans and aliens for the purpose of securing the entry of the aliens into the United States under the War Brides Act.

At the conclusion of the government's case, Petitioners moved for acquittal on the substantive counts (R. 288), and all five counts were dismissed by the trial court on the ground that proper venue as to them had not been proved (R. 290-91).

Petitioners perfected appeals to the Court of Appeals for the Seventh Circuit on the grounds, among others, that (1) the trial court had erred in admitting into evidence acts and declarations of co-conspirators occurring after the alleged conspiracy had terminated and not in furtherance of it; (2) the wife of a defendant in a criminal case is incompetent to testify against him; and (3) the validity of the marriages by which entry of the aliens was accomplished under the War Brides Act ought be determined according to the law of the country where the marriages took place, namely, France; since the government failed to prove that under French law the marriages were invalid, there was failure of proof with respect to a vital element of the government's case.

The Court of Appeals affirmed the convictions, and in so doing it did not dispute the essential facts upon which Petitioners rested the above contentions. Rather the Court below rejected Petitioners' arguments as to the law applicable to those facts, and in its two opinions stated a variety of reasons for doing so. The original opinion of the Court below is set out at R. 391-400; the opinion denying the petition for rehearing, at R. 404-14.

With regard to Petitioners' first argument, the Court below, in its first opinion, took the position that the acts and declarations of a conspirator after the termination of the conspiracy and not in furtherance of it are admissible against absent co-conspirators on the question of their intent to enter into and carry out the conspiracy (R. 399). This ruling remained unchanged in the second opinion of the Court below.

With regard to Petitioners' second contention, the Court below seemed to agree, in its first opinion, that wives in a criminal case are incompetent to testify against their husbands (R. 397), but concluded that since the validity

of the marriages ~~was~~ contested and was therefore a question of fact for the jury, and since the jury by its verdict resolved that question by finding the marriages invalid, there were in fact no marriages and hence the rule as to the incompetency of wives did not arise. In their Petition for Rehearing, as well as in their original Brief, Petitioners pointed out to the Court of Appeals that such a ruling permitted the jury to become judges; not only of the contested question of fact relating to the validity of the marriages, but also of the question of law relating to the competency of the wives as witnesses. In addition, the Petitioners argued that this ruling permitted the trial court to invade the province of the jury, for, by permitting the wives to testify, the court in effect was ruling upon the ultimate question which the jury had to decide, namely, the validity of the marriages. In its second opinion, the Court below shifted its ground and held directly that wives, under the modern trend of judicial thought, are competent in criminal cases to testify against their husbands (405-13).

With regard to Petitioners' third argument, the Court below held, in its first opinion, that a sham marriage, void under the law of this country as against public policy, has no validity, regardless of what the law may have been where contracted (R. 396). The Petition for Rehearing pointed out that a marriage valid where celebrated is valid everywhere, unless it is contrary to the laws of nature or is declared by positive law to be void, and that with respect to the marriages involved here no law of nature and no positive law had been violated. In fact, it was pointed out to the Court below that the majority rule gave validity to a marriage entered into for the purpose of accomplishing some definite extra-marital object but pursuant to an understanding that subsequently the parties would go their separate ways. In its second opinion, the Court be-

law again shifted its ground, holding that in the absence of proof the marriage laws of a foreign country are presumed to be the same as those of the forum, since there is no presumption that they are different. The Court ruled, therefore, that since the Petitioners had not rebutted the presumption that French law was the same as Illinois law, and since under Illinois law the marriages were void, the marriages were void under French law (R. 414).

REASONS FOR GRANTING THE WRIT.

I.

The Court below, in holding that the acts and declarations of a conspirator after the termination of the conspiracy are admissible against absent co-conspirators to show their intent, has created a novel doctrine of federal law in conflict with the applicable decisions of this Court. This doctrine does such violence to standards of justice in criminal cases as to require the exercise of the supervisory power of this Court over the administration of criminal justice.

The alleged objective of the conspiracy charged was to secure the illegal entry of three aliens at the port of New York (R. 5, 6). Upon the attainment of that objective the conspiracy terminated. *United States v. Rubenstein* (C. A. 2d, 1945), 151 F. (2d) 915, 917; *Fiswick v. United States* (1946), 329 U. S. 211. Despite this fact, the trial Court admitted against *all* defendants evidence of acts and declarations of each of them occurring outside the presence of the others and after the conspiracy had terminated. This evidence was received against *all*, over objection, on the sole ground (R. 66-69) that the indictment charged a subsidiary continuing conspiracy to conceal in the following language:

“It was further a part of said conspiracy that the said defendants would at all times subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem neces-

sary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy". (R. 7).

On appeal, the defendants contended that this Court in *Krulewitch v. United States* (1949), 336 U. S. 440, had expressly rejected the grounds upon which the trial court had admitted such evidence. In that case, this Court stated at pp. 443-444:

"This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts. The Government now asks us to expand this narrow exception to the hearsay rule and hold admissible a declaration, not made in furtherance of the alleged criminal transportation conspiracy charged, but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment. * * * We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence."

The Court below completely ignored the *Krulewitch* case and defendants' arguments based upon it. Instead, it adopted as a basis for the admission of this testimony a ground for which it cited no authority and which was never urged or argued by the government.¹ It permitted

1. The government, on appeal, had attempted to distinguish the *Krulewitch* case on the grounds that here the conspiracy to conceal was expressly charged in the indictment, whereas in that case this Court dealt with an implied conspiracy to conceal. The Court below apparently rejected this argument for the obvious reasons that (1) whether the conspiracy to conceal was expressly or impliedly charged was immaterial, and (2), the proof here disclosed that the defendants discussed their participation in the alleged conspiracy with virtually any and everyone and hence there was no proof of an effort to conceal at all.

the admission against *all* defendants of acts and declarations of each of the conspirators after the termination of the conspiracy, on the ground that such acts and declarations were relevant and competent on the question of defendants' intent to enter into and carry out the conspiracy. In this connection the Court below stated:

"Complaint is made that the court permitted evidence of events in America subsequent to the entries. When we remember that this case turned almost entirely upon the question of the validity of the Parisian marriages and that whether they were valid, in turn, depended upon *the intent of the parties at the time the ceremonies occurred*, it is clear that not only what was said and done prior to the time of the marriages, but that the *conduct of the parties and their statements* after they returned to America were relevant and competent for the jury to consider in determining whether in fact they reflected *an intent* to have performed valid marriages or whether they tended to show that *the intent* was merely to pretend to be married." (Emphasis added.) (R. 399.)

The decision below is in derogation of the firmly established principle that the acts and declarations of a conspirator are admissible against absent co-conspirators only when they occur during the conspiracy and in furtherance of the common design, and it is in conflict with decisions of this Court so holding. *Krulewitch v. United States* (1949), 336 U. S. 440, 443; *Fiswick v. United States* (1946), 329 U. S. 211; *Logan v. United States* (1892), 144 U. S. 263. The principle is itself an exception to the hearsay rule. The decision below now extends that exception so as to admit into evidence statements and acts of a conspirator not in furtherance of the conspiracy and after it has terminated in any case where intent is a factor. Since intent is a vital element in virtually every conspiracy, the force of the decision is to nullify the hearsay rule in

such prosecutions. It would even permit the use against one conspirator of the confession of another although made outside the presence of the first if the confession bears upon the question of intent, as most confessions do.

The decision below is so obviously in conflict with the decisions of other Circuits that it appears that no argument ought be required to demonstrate how patent is the error complained of.¹ However, we point out that this Court has already indicated by its reversal of the Court of Appeals for the Second Circuit in the *Krulewitch* case that it will not permit such an extension of the exception to the hearsay rule. In the decision there under review, *United States v. Krulewitch* (C. A. 2d, 1948), 167 F. (2d) 943, the lower Court had evidenced in its opinion a belief that post-conspiracy statements were admissible against absent co-conspirators on the question of intent. That Court stated, pp. 947-48:

"But while it might conceivably be held that this evidence was admissible to show appellant's intent [*United States v. Rubenstein*, 151 Fed. (2d) 915], we prefer to rest our decision on another ground. We think that implicit in a conspiracy to violate law is an agreement among the conspirators to conceal the violation after as well as before the illegal plan is consummated."

Quite obviously this Court, by reversing, took the view that neither ground set forth by the Court of Appeals for the Second Circuit was sufficient to permit the introduction of such evidence, since this Court would have affirmed the decision of the lower Court if either reason

¹ Cf. *Dowdy v. United States* (C. A. 4th, 1931), 46 F. 2d 417; *Clark v. United States* (C. A. 5th, 1932), 61 F. 2d 409; *Tofanelli v. United States* (C. A. 9th, 1928), 28 F. 2d 580; *Holt v. United States* (C. A. 10th, 1937), 94 F. 2d 90; *Mora v. United States* (C. A. 5th, 1951), 190 F. 2d 749, 751.

or ground were correct. *Helvering v. Gowran* (1937), 302 U. S. 238; *J. E. Riley Inv. Co. v. Commissioner of Internal Revenue* (1940), 311 U. S. 55. That the Court of Appeals for the Second Circuit so understood is quite evident from its discussion in *United States v. Hall* (C. A. 2d, 1950), 178 F. (2d) 853, wherein it stated, p. 854:

“For, as we have been recently admonished, statements by one conspirator are to be received against others only when made in furtherance of a going conspiracy charged against them. *Krulewitch v. United States*, 336 U. S. 440.”

This new breach of the general rule against the admission of hearsay evidence created by the Court below should not be permitted to remain open. As seen, the decision of the Court below has created a conflict with decisions of this Court and the Courts of Appeals for the other Circuits. As the concurring Justices observed in the *Krulewitch* case, p. 455, the Court below has created “an ominous expansion of the accepted law of conspiracy.” As in that case, this Court ought to exercise its supervisory power over the administration of criminal justice and close the breach.

II.

In holding that wives are competent to testify against their husbands, the Court below has decided an important question of federal law in conflict with applicable decisions of this Court and in conflict with decisions of the Court of Appeals for the Second, Third and Sixth Circuits.

For the first time in 60 years, this Court is called upon to review a decision of a Court of Appeals directly holding that a wife is competent to testify against her husband in a criminal case not involving a personal wrong against her. The Court below, in so deciding, held that “under

the modern trend of thought in this country, the spouse, instead of being incompetent, is to be admitted as an interested witness, whose credibility is for the jury" (R. 412). It based this conclusion on an application of Rule 26 of the Federal Rules of Criminal Procedure providing that the competency and privileges of witnesses should be governed, in the absence of an act of Congress, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience (R. 413).

The final resolution by this Court of the decision below is of the utmost importance. If permitted to stand it will have broad impact in almost every criminal case involving a married defendant. And since it is in direct conflict, as is hereafter shown, with decisions of this Court and Courts of Appeals for the Second, Third and Sixth Circuits, it creates a rule of evidence different from that prevailing in those Circuits. Further, the decision below will have national effect on the security and confidence of the marital relationship and will disturb domestic tranquility.

A. The decision of the Court below is in direct conflict with decisions of this Court.

In *Miles v. United States* (1881), 103 U. S. 304, and *Bassett v. United States* (1890), 137 U. S. 496, this Court decided that wives were not competent to testify against their spouses. This was recognized by this Court in *Griffin v. United States* (1949), 336 U. S. 705, 714-15, where the Court stated:

"The federal courts have held that one spouse cannot testify against the other unless the defendant spouse waives the privilege * * * * Since this Court in the Funk case left open the question whether

this rule should be changed, *Funk v. United States*, 290 U. S. 371, 373 * * *, it presumably is still the 'federal rule' for the lower courts."

B. The decision of the Court below is in direct conflict with the decisions of the Courts of Appeals for the Second, Third and Sixth Circuits.

Since this Court decided in *Funk v. United States* (1933), 290 U. S. 371, that spouses were competent to testify for each other, the Courts of Appeals for three Circuits have directly held that a wife is incompetent to testify *against* her husband in a federal criminal case. *Paul v. United States* (C. A. 3d, 1935), 79 F. (2d) 561; *Brunner v. United States* (C. A. 6th, 1948), 168 F. (2d) 281; *United States v. Walker* (C. A. 2d, 1949), 176 F. (2d) 564, cert. den. 338 U. S. 891. Prior to the decision of the Court below, only one Court of Appeals had declared otherwise. *Yoder v. United States* (C. A. 10th, 1935), 80 F. (2d) 665. But in that case, as Judge Learned Hand pointed out in *United States v. Walker* (C. A. 2d, 1949), 176 F. (2d) 564, 568, the Court "did not have to decide the point, because the wife had in fact been divorced, and that made her testimony competent under the old law."

In the *Walker* case, Judge Hand, after reviewing the authorities, wrote at page 568:

"We conclude therefore that we should await the choice of Congress between the conflicting interests involved, *or such an overwhelming general acceptance by the states of abolition of the privilege*, as induced the Supreme Court to action in *Funk v. United States*, *supra*." (Emphasis added.)

C. The decision of the Court below conflicts in principle with the decision of this Court in *Funk v. United States* and with Rule 26 of the Federal Rules of Civil Procedure.

Under the *Funk* case changes in the law of evidence in federal criminal cases are to be permitted "in the light of fundamentally 'altered' conditions," 290 U. S. 371, 383. This Court there announced that in making such changes federal Courts are to look to reason and experience to find the present rule. Experience is to be ascertained from the general trend of legislative and judicial opinion. However, with respect to the rule making one spouse incompetent to testify against the other in a federal criminal case, conditions have not been fundamentally altered. The climate of judicial opinion remains the same. (See cases collected, 11 A. L. R. 2d 646 (1949).) Furthermore, reason dictates now that the marriage relationship should be protected against hostile testimony by one spouse against another as it did 100 years ago. Cf. *United States v. Blau* (1951), 340 U. S. 332, 334.

The Court below found a modern trend in cases dealing with crimes against the person of the wife, such as prostitution—an exception at common law—and in the *Yoder* case rejected by Judge Hand in *United States v. Walker* (C. A. 2d, 1949), 176 F. (2d) 564. An examination of state court decisions, however, shows that a "modern trend" such as moved this Court to action in the *Funk* case does not exist. The modern rule is stated at 11 A. L. R. 2d 648 (1949):

"Thus, a crime against one other than a spouse, regardless of other circumstances, is held by the great weight of authority not to be an offense which will qualify the defendant's spouse to testify for the prosecution."

Cases from only two states are cited in opposition to this proposition, while cases from fourteen states are cited in support of it.¹

The decision of the Court below, therefore, by announcing a new rule with respect to competency of spouses to testify against each other in criminal cases, in the face of an overwhelming weight of authority to the contrary, conflicts in principle with the decision of this Court in the *Funk* case, and with Rule 26 of the Federal Rules of Criminal Procedure.

1. Decisions by the Courts of Arkansas, Delaware, Georgia, Michigan, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, South Dakota, Texas, Washington, West Virginia, and Wisconsin are cited in support of the above quoted proposition. In addition to decisions in some of these states, decisions by courts in Colorado, Connecticut, Minnesota, Mississippi, Pennsylvania, Tennessee and Utah are cited in support of the proposition that: "It has also been held by a majority of courts that a crime by one spouse against the other, even though it involves extreme personal violence, will not, if committed prior to the marriage, render the injured spouse competent as a witness against his or her wife or husband." 11 A. L. R. 2d 649. And decisions by courts in Illinois and Virginia are cited in support of the proposition that: "And, finally, where a crime committed by one spouse is essentially an offense against the property of the other (for example, arson, forgery, or theft), testimony of the latter is generally declared not to be admissible in evidence against the defendant." 11 A. L. R. 2d 650.

The Court below, in holding that the marriage laws of France would be presumed to be the same as those of Illinois, that it was therefore the duty of defendants to show them to be different if in fact they were, and that in the absence of such a showing the marriages were void under French law, decided important questions of criminal law and of conflict of laws in a manner contrary to settled principles, in such a manner as improperly to shift the burden of proof to the defendants, and in conflict with decisions of this Court and of Courts of Appeals for the Second, Third, Sixth, and Ninth Circuits.

The marriages in which the defendants participated and which the government alleged to be invalid took place in Paris, France (R. 60, 199, 247). The Court below conceded that the contest in the trial court centered about two factual questions—"Did the defendants conspire and if so, did the Government prove by competent evidence that the marriages were in fact invalid?" (R. 392.) As to the latter question, the Court below stated that if the defendants "had bona fide intentions to enter into the marital relation, they had a perfect right to invoke the provisions of the War Bride Act in gaining access to this country. We are confronted then with the crucial question of whether the evidence justified a finding that the so-called marriages were void." (R. 395-6.)

At the trial despite Petitioners' argument that the burden was on the government to prove the law of France with regard to the invalidity of the marriages, the trial court stated that it "would assume the law of Paris, France is the same as the law of Chicago, Illinois." (R. 189.) Consequently, no evidence as to French law was introduced by the Government.

A. The ruling of the Court below that the marriage laws of France would be presumed to be the same as those of Illinois conflicts with applicable decisions of this Court and of the Courts of Appeals for the Second and Ninth Circuits.

In its original opinion the Court below affirmed the ruling of the trial court on the question of French law but on the different ground that a sham marriage, void under the laws of this country as against public policy, can have no validity. *Lincoln v. Riley*, 217 Ill. App. 571.

The petition for rehearing pointed out that *Lincoln v. Riley* referred only to a public policy which was declared by statute and that since in the case at bar there was no such declared public policy, the validity of the marriages should have been determined by the law of the place where they were contracted, *i. e.*, France.¹

The Court below thereupon, in its second opinion, shifted its ground but again reached the same result. This it did by ruling that the marriage laws of a foreign country, in the absence of proof to the contrary, are presumed to be the same as those of the forum and that the burden of showing the contrary was on petitioners. This ruling conflicts with decisions of this Court, holding that no such presumption may be engaged in, particularly where the law of the foreign country is derived from the civil law rather than common law regions.

The leading case on this subject is *Cuba R. Co. v. Crosby* (1912), 222 U. S. 473, in which this Court held that the

1. In this connection the petitioners in their briefs and petition for rehearing cited *U. S. v. Rubenstein*, (C. A. 2d 1945), 151 Fed. 2d 915; *Franzen v. E. I. DuPont de Nemours & Co.* (C. A. 3d, 1944), 146 Fed. 2d 837, and *Toshiko Inaba v. Nagle* (C. A. 9th, 1929) 36 Fed. 2d 481. These cases established that the validity of a marriage must be determined by the law of the place where contracted.

burden was on the plaintiff to prove that he had a right to recover under Cuban law and that in the absence of such proof it would not be presumed that the Cuban law was the same as that of the forum. See also *Church v. Hubbart* (1804), 2 Cranch. 287; *United States v. Wiggins*, 39 U. S. 334.

The decision below in this respect is also in conflict with decisions of the Second Circuit in the cases of *Cosulich Societa Triestina Di Navigazione v. Elting* (C. A. 2d 1933), 66 Fed. 2d, 534, 536; *U. S. ex rel. Jelic v. District Director of Immigration* (C. A. 2d, 1939), 106 Fed. 2d, 14; *Ozanic v. U. S.* (C. A. 2d 1948), 165 Fed. 2d 738, 744; and *Commissioner v. Hyde* (C. A. 2d, 1936), 82 Fed. 2d, 174.

In the first of these cases the question of an alien woman's admissibility to the United States depended upon the validity of her marriage by proxy in Italy to a man then domiciled in New Jersey and a citizen of the United States. No proof on the law of Italy on proxy marriages was introduced and the Court declined to presume it, stating that "It would be a violent presumption that [the law of Italy on that subject] corresponded with our own."

In the *Jelic* case the Court held that a failure by the Director of Immigration and Naturalization to prove the German law relating to forgery, vitiated a finding of moral turpitude by him against the respondent.

In the *Ozanic* case the Court held that there was no presumption that the law of Yugoslavia as to the measure of damages was the same as the United States, and finally in the *Hyde* case, the Court of Appeals for the Second Circuit ruled that there is no presumption that French law is the same as that of New York with respect to the construction of a trust agreement executed in France.

Further, the decision below also conflicts with the decision of the Court of Appeals for the Ninth Circuit in

Gordon v. Commissioner (C. A. 9th, 1935), 75 Fed. 2d, 429, 430, that there is no presumption that Canadian law as to the rights of a husband and wife is the same as California law.

To summarize the matter as plainly as possible, the rulings below (1) excused the government from proving what would otherwise be an essential fact; namely, the law of France with respect to the validity of the marriages involved; (2) pronounced the law of France to be the same as that of Illinois; (3) placed upon the defendants the burden of showing any differences between French and Illinois marriage law.

This position was taken in the absence of any showing that it would be improper or virtually impossible for the government to be required to prove French law, and in fact the Assistant United States Attorney indicated that he had looked into the French law to some extent (R. 189). And most startling of all, it was taken with respect to the laws of a country whose legal system has very little in common with our own. As the cases cited above indicate, the limits even in civil cases, of permissible presumptions as to foreign law are quite narrow where a civil law country such as France is involved. The limits are even narrower when the question is something other than a routine one. See *E. Gelli & Co. v. Cunard S. S. Co.* (C. A. 2d, 1931), 48 F. 2d, 115, 117. Here, quite obviously, the question of the validity of the marriages was anything but simple, and in fact it is one upon which there is considerable divergence among the several states.

The authorities cited by the Court below in support of its ruling are singularly inapposite (R. 414). Not one of them is a federal criminal case. Not one of them is a criminal case involving the law of a foreign country. Not one of them presumes that the marriage law of a foreign coun-

ing burden of proof in criminal cases and permits presumptions as to the existence of facts essential to conviction.

The desire for the development of a uniform body of rules of evidence as expressed in Rule 26 of the Federal Rules of Criminal Procedure has been dealt a hard blow. The need for such uniformity is particularly vital in the field of conspiracy since it is there that the government may nearly always choose the venue. This is strikingly apparent in this case where, in addition to the conspiracy, the indictment contained five substantive counts which were dismissed because the proper venue as to them lay in the Southern or Eastern District of New York.

By bringing the indictment in the Northern District of Illinois rather than the Southern or Eastern District of New York, the government was able to by-pass rules of evidence applicable in the Second Circuit, which would have prevented the admission of all of the evidence here complained of. This court ought not place its imprimatur on such practices which can exist only because of lack of uniformity. The errors in the decision below require the exercise of the supervisory power of this court over the administration of criminal justice.

We earnestly urge that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

ANTHONY BRADLEY EBEN,

RICHARD F. WATT,

BERNARD WEISSBURD,

Counsel for Petitioners.

JOSEPH L. NELLIS,

DUNNING, NELLIS & LUNDIN,

of Washington, D. C.,

Of Counsel.